KARUMALAY VANNIYAN & ANOR

v.

ANANTHAN RETHINAM

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: P-04-87-2001]
10 MARCH 2005

CIVIL PROCEDURE: *Appeal - Evidence, evaluation of - Road accident - Insufficient judicial evaluation and appreciation of evidence adduced - Whether interference by appellate court warranted*

ROAD TRAFFIC: *Negligence - Collision between motorcyclists - Evaluation of evidence by trial judge - Whether proper*

EVIDENCE: *Conflicting testimony - Road accident - Whether judge made erroneous inferences*

The appellants as plaintiffs brought an action against the respondent as defendant in the sessions court due to an accident that involved both parties. The respondent while riding his motorcycle was alleged to have collided into the motorcycle driven by the 1st appellant as rider with the 2nd appellant as pillion rider. A prime witness of the appellants ('PW2') was said to have helped the injured appellants after the accident occurred. Both appellants were hospitalised as a result of the accident. In the sessions court, the respondent in his defence submitted that he was sleeping at the material time, and on an alternate plea he submitted that even if he was involved, the collision was due to the negligence of the appellants. The learned judge ('SCJ') came to the conclusion that the appellants failed to prove their case. Their accounts of the incident were found to be conflicting and thus not credible. The evidence of PW2 was also disbelieved. On appeal to the High Court, the learned judge ('HCJ') concurred with the findings of the SCJ, particularly on the credibility of the appellants and that of PW2. Hence, this appeal by the appellants.

Held (allowing the appeal)
Per Richard Malanjum JCA delivering the judgment of the court:

[1] In the SCJ's grounds of judgment, the inconsistencies in the testimonies of the appellants and that of PW2 were over-emphasised without considering the overall evidence adduced. There was hardly any challenge to the evidence of the appellants and that of PW2 on specific and relevant material facts to the claim, namely, that the collision did happen and that the appellants were injured. (p 441 d-f)

[2] In view of the defence adopted by the respondent during the trial, the only main issue left for determination was the identification of the respondent's motorcycle in the collision. Such issue should have been resolved by simply identifying the relevant evidence adduced by the appellants and the respondent and then assessing, weighing and, for good reasons, accepting or rejecting the whole or any part of such evidence. Unfortunately, the SCJ had failed to do so. There was nothing to indicate that the SCJ actually believed the respondent and disbelieved the appellants and PW2. Accordingly, interference by this court was warranted since there was no consideration of material evidence and appreciation of evidence. Further, the approach to the evidence was not objective and one-sided. (pp 441 f-h & 442 a)

[3] The SCJ went by way of inference and deduction in disbelieving the evidence of the appellants and that of PW2 based on the discrepancies in their evidence. Their other unchallenged but material evidence was completely ignored. In fact, the noted discrepancies did not relate directly to the identification of the respondent's motorcycle in the collision. That approach taken by the SCJ was flawed in law. (pp 442 b & 443 b)

[4] The SCJ also expressed reservation on the ability of PW2 to recall the registration number of the respondent's motorcycle involved in the collision just because he denied visiting the 1st appellant in the hospital. That doubt was unjustified since his denial was not proved to be false. (p 443 c)

[5] The SCJ failed to consider the fact that PW2 was unknown to the appellants before the collision and that his evidence was not motivated by any reason. In other words, PW2 was an independent witness. (p 443 e)

[6] The SCJ made an inference, on the evidence of PW2, that the appellants could not have seen the registration number of the respondent's motorcycle. The inference was too presumptuous. It also set too high a

standard for the appellants to meet when there was no necessity to do so. The SCJ refused to believe the appellant's version even with the benefit of clarification by PW2. Critical factors such as the absence of motive on the part of PW2 in coming to the court to testify and that the appellants and PW2 were strangers before the collision were not taken into account before disbelieving PW2. There was, therefore, no proper appreciation of the evidence. (pp 443 h & 444 f-g)

[7] Once part of a witness's evidence is disbelieved the rest should be considered with caution and if any part of it is relied upon, cogent reason for doing so should be given. In the present case, the SCJ failed to adhere to such principles of law when he disbelieved PW2 on the one hand and believed him on the other hand by relying on his evidence to disbelieve the appellants. (pp 444 h & 445 a)

[8] As for PW2's failure to lodge a police report or to inform and assist the police in its investigation on the collision, it is settled law that a witness should not be disbelieved just because he did not on his own accord go to the police and make a statement. (p 445 d)

[9] There was no lawful and justifiable reason for disbelieving the testimony of PW2 particularly his assertion that he saw and could still remember the registration number of the respondent's motorcycle. His evidence provided the nexus between the motorcycle of the respondent and the collision. (p 445 f)

[10] Although there was an alternative plea that the collision was wholly caused or contributed to by the negligence of the appellants, no evidence was led on this aspect of the defence. Hence, that allegation stood unsubstantiated. (p 446 b)

[11] The SCJ noted the change in the address given by the respondent in the course of his testimony but did not make an issue out of it. Instead it was only highlighted that the respondent had maintained his stand that he was sleeping in his house at the material time and that he did not lend his motorcycle to anyone. Judicial evaluation of the evidence of the respondent was obviously absent. The SCJ failed to perform the mandatory judicial function as opined by the Privy Council in *Choo Kok Beng v. Choo Kok Hoe & Ors.* (p 446 c-f)

[12] The SCJ faulted the appellants for not calling as a witness the investigating officer of the case, and for failing to give any reason for such failure. However, no such fault was attributed to the respondent for not calling his landlord despite an earlier indication to the sessions court that he would be called and time was given to do so. Although the apparent one-sided approach by the SCJ might have been premised on the basis that the burden was on the appellants to prove their case, an attempt to equalise the standard of appreciation of the evidence adduced by both sides should have been made. Otherwise, it would be equivalent to disbelieving the appellants and PW2 on the basis of the testimony of the respondent that was not clearly considered and accepted. Such approach runs foul of the requirement that a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for, good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. (pp 446 g-h & 447 a)

[13] In his judgment, the HCJ took it as a fact that the respondent's motorcycle was involved in the collision. Subsequently, he stated that the SCJ accepted as a fact that the respondent was sleeping in his house at the material time. No such finding of fact was made by the SCJ. The HCJ also made inferences and assumptions that were not supported by the evidence adduced. He concluded that the SCJ could not accept the evidence of PW2 due to the "material discrepancies" between the evidence of PW1, PW2 and PW4. Such reasoning did not come from the SCJ. The term used was "inconsistencies" and there was no qualification made whether such inconsistencies were major or minor. In law, the two categories have different connotations. Nevertheless, even where there are material inconsistencies in the evidence of a witness, he can be believed if he is supported by other satisfactory evidence. It followed that a proper appreciation and evaluation of the evidence and materials would have led a finding of liability on the balance of probabilities against the respondent. (pp 447 b-d, g-h & 448 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Di Mahkamah Sesyen, perayu-perayu sebagai plaintif telah memulakan tindakan terhadap responden sebagai defendan ekoran dari satu kemalangan yang melibatkan mereka semua. Responden, semasa menunggang motosikalnya, dikatakan telah melanggar motosikal yang ditunggang oleh perayu pertama dan dibonceng oleh perayu kedua. Saksi utama perayu-perayu ('PW2') dikatakan telah membantu perayu-perayu yang tercedera selepas berlakunya kemalangan. Fakta juga menunjukkan bahawa kedua-dua perayu telah dimasukkan ke

hospital selepas kemalangan. Di Mahkamah Sesyen, dalam pembelaannya, responden mengatakan bahawa beliau sedang tidur pada waktu material, dan secara alternatifnya, bahawa, jikapun beliau terlibat, kemalangan adalah disebabkan oleh kecuaian perayu-perayu. Yang arif hakim ('HMS') merumuskan bahawa perayu-perayu gagal membuktikan kes mereka, atas alasan bahawa keterangan mereka mengenai kemalangan adalah bertentangan dan tidak boleh dipercayai. Keterangan PW2 juga tidak dipercayai. Semasa rayuan di Mahkamah Tinggi, yang arif hakim ('HMT') menyetujui keputusan yang dibuat oleh HMS, terutama berkaitan kebolehpercayaan perayu-perayu dan PW2. Maka perayu-perayu merayu.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

[1] Dalam alasan penghakiman HMS, ketidak-konsistenan pada keterangan perayu-perayu serta PW2 telah diperbesarkan tanpa menimbang keseluruhan keterangan yang dikemukakan. Keterangan perayu-perayu dan PW2 serta fakta-fakta material tuntutan, iaitu bahawa telah berlaku perlanggaran yang menyebabkan kecederaan kepada perayu-perayu, langsung tidak dicabar.

[2] Mengambil kira pembelaan yang dipilih responden semasa perbicaraan, isu utama yang perlu diputuskan hanyalah berhubung identifikasi motosikal responden di perlanggaran tersebut. Isu ini sepatutnya boleh diselesaikan dengan mengenalpasti keterangan-keterangan yang diberikan oleh perayu-perayu dan responden, dan kemudian membuat penilaian, mempertimbang dan, atas alasan-alasan kukuh, menerima atau menolak keseluruhan atau sebahagian dari keterangan-keterangan tersebut. Malangnya, ini tidak dibuat oleh HMS. Tiada suatu apapun yang menunjukkan bahawa HMS telah mempercayai responden dan tidak mempercayai perayu-perayu dan PW2. Dengan demikian, campurtangan mahkamah ini adalah wajar, kerana terdapat kegagalan untuk mempertimbang keterangan-keterangan material dan menilai keterangan-keterangan. Selain itu, pendekatan yang diambil terhadap keterangan juga tidak objektif dan berat sebelah.

[3] HMS telah menggunakan inferens dan kesimpulan untuk tidak mempercayai keterangan perayu-perayu dan PW2 berasaskan percanggahan-percanggahan yang ada padanya. Keterangan-keterangan mereka yang lain, yang material tetapi tidak dicabar, telah tidak diendahkan. Malah, percanggahan yang dicatatkan itu tidak menyentuh secara langsung identifikasi motosikal responden di dalam perlanggaran. Pendekatan sebegini yang diambil oleh HMS adalah cacat di sisi undang-undang.

[4] HMS juga merakamkan keraguan terhadap kemampuan PW2 mengingati nombor pendaftaran motosikal responden yang terlibat dalam perlanggaran cuma kerana PW2 menafikan pernah melawat perayu pertama di hospital. Keraguan tersebut tidak wajar kerana penafian PW2 itu tidak dibuktikan sebagai palsu.

[5] HMS telah gagal menimbang fakta bahawa PW2 adalah tidak dikenali oleh perayu-perayu sebelum perlanggaran dan keterangannya adalah tidak dirangsang oleh motif-motif tertentu. Dengan lain perkataan, PW2 adalah seorang saksi bebas.

[6] HMS telah membuat inferens, atas keterangan PW2, bahawa perayu-perayu tidak mungkin dapat melihat nombor pendaftaran motosikal responden. Inferens ini adalah terlalu presumptuous. Ia juga meletakkan standard yang terlalu sukar bagi perayu-perayu untuk memenuhinya, sedangkan tiada langsung keperluan untuk berbuat demikian. HMS enggan mempercayai versi perayu-perayu walaupun setelah mendapat faedah penjelasan oleh PW2. Faktor-faktor kritikal seperti ketiadaan motif di pihak PW2 apabila datang memberi keterangan di mahkamah, dan bahawa perayu-perayu dan PW2 adalah saling tidak mengenali sebelum berlaku kemalangan, telah tidak diambil kira sebelum enggan mempercayai PW2. Adalah jelas bahawa keterangan-keterangan telah tidak dinilai dengan sewajarnya.

[7] Sebaik sebahagian dari keterangan seorang saksi itu tidak dipercayai, keterangan selebihnya harus dipertimbang dengan penuh hati-hati, dan, jika ada dari bahagian selebih tersebut diterima, sebab-sebab kukuh bagi penerimaan hendaklah diberi. Dalam kes semasa, prinsip undang-undang ini gagal dipatuhi oleh HMS apabila beliau tidak mempercayai PW2 di satu pihak dan mempercayainya di pihak yang lain dan bergantung kepada keterangan PW2 tersebut untuk tidak mempercayai perayu-perayu.

[8] Berhubung kegagalan PW2 untuk membuat laporan polis atau memberi maklum kepada polis atau membantu mereka dalam penyiasatan terhadap kemalangan, ianya sudah menjadi undang-undang mantap bahawa seseorang saksi tidak seharusnya tidak dipercayai cuma kerana beliau tidak dengan rela hati pergi kepada polis dan membuat kenyataan.

[9] Tiada alasan sah dan wajar untuk tidak mempercayai keterangan PW2 terutama pengataannya bahawa beliau melihat dan masih boleh mengingati nombor pendaftaran motosikal responden. Keterangannya membekalkan nexus di antara motosikal responden dan perlanggaran.

[10] Walaupun terdapat pembelaan alternatif bahawa perlanggaran disebabkan keseluruhannya atau disumbang oleh kecuaian perayu-perayu, tiada keterangan dikemukakan bagi aspek pembelaan ini. Pembelaan ini, dengan itu, tidak disokong oleh apa-apa.

[11] HMS telah mengambil maklum tentang pertukaran pada alamat yang diberi oleh responden semasa memberikan keterangan, tetapi tidak menjadikannya suatu isu. Beliau sebaliknya menekankan bahawa responden mempunyai pendirian tetap bahawa ia sedang tidur dirumahnya pada waktu material dan bahawa ia juga tidak meminjamkan motosikalnya pada sesiapa pun. Suatu penilaian kehakiman terhadap keterangan responden jelas tidak kelihatan di sini. HMS telah gagal melaksanakan tugas kehakiman yang diwajibkan sepertimana yang dikatakan oleh Majlis Privi dalam *Choo Kok Beng v. Choo Kok Hoe & Ors.*

[12] HMS mempersalahkan perayu-perayu kerana tidak memanggil pegawai penyiasat kes sebagai saksi, dan kerana gagal memberikan sebab atas kegagalan itu. Bagaimanapun, responden tidak dipersalahkan kerana gagal memanggil tuan rumahnya, walaupun terdapat ura-ura kepada Mahkamah Sesyen bahawa beliau akan dipanggil dan masa telah diberi untuk tujuan itu. Walaupun pendekatan yang kelihatan berat sebelah oleh HMS tersebut mungkin bersandarkan kepada asas bahawa beban adalah terletak atas perayu-perayu untuk membuktikan kes mereka, namun, percubaan harus dibuat untuk menyamakan standard penilaian terhadap keterangan yang dikemukakan oleh kedua-dua pihak. Jika tidak, ia samalah seperti tidak mempercayai perayu-perayu dan PW2 dengan berdasarkan keterangan responden yang tidak dipertimbang dengan jelas dan diterima. Pendekatan sedemikian adalah bertentangan dengan prinsip bahawa seseorang hakim, dalam mengadili sesuatu pertikaian itu, perlu membuat keputusan atas isu fakta dengan menilai, menimbang dan, atas alasan-alasan kukuh, menerima atau menolak keseluruhan atau sebahagian dari keterangan yang berada di hadapannya.

[13] Dalam keputusannya HMT mendapati sebagai fakta bahawa motosikal responden terlibat dalam perlanggaran. Berikutnya, beliau menyatakan bahawa HMS telah menerima sebagai fakta bahawa responden sedang tidur di rumahnya pada waktu material. Tiada dapatan sedemikian telah dibuat oleh HMS. HMT juga telah membuat inferens dan anggapan-anggapan yang tidak disokong oleh keterangan yang dikemukakan. Beliau merumuskan bahawa HMS tidak dapat menerima keterangan PW2 disebabkan oleh "percanggahan-percanggahan material" di antara keterangan-keterangan PW1, PW2 dan PW4. Alasan yang sedemikian

tidak dibuat oleh HMS. Terma yang digunakan adalah "ketidak-konsistenan" (inconsistencies) dan tiada batasan dibuat sama ada ketidak-konsistenan tersebut ketidak-konsistenan yang besar atau kecil. Di sisi undang-undang, kedua-dua kategori ini membawa konotasi yang berbeza. Namun begitu, jikapun terdapat ketidak-konsistenan yang material pada keterangan seseorang saksi, beliau boleh dipercayai jika ianya disokong oleh keterangan-keterangan lain yang kukuh. Ianya mengikut bahawa, jika keterangan dan material diberikan penilaian dan pemahamannya yang betul, suatu dapatan akan dicapai bahawa responden adalah bertanggungan atas imbangan kebarangkalian.

Case(s) referred to:

Abraham Ho Ah Loke v. William Manson-Hing [1949] MLJ 37 ***(refd)***
Benmax v. Austin Motor Co Ltd [1955] AC 370 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 2 MLJ 165 ***(refd)***
Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 FC ***(refd)***
Ee Choon Bok & Anor v. PP [1951] 17 MLJ 183 ***(refd)***
Kalachand Sircar v. Queen-Empress ILR 13 Cal 53 ***(refd)***
Khoon Chye Hin v. PP [1961] 27 MLJ 105 ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien [2001] 1 CLJ 316 CA ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
PP v. Ramli Shafie [2002] 6 MLJ 153 ***(refd)***
Putra v. Sivagnanam & Anor [1959] 25 MLJ 259 ***(refd)***
Shanmugam v. PP [1963] 29 MLJ 125 ***(refd)***
Sheo Swarup & Ors v. The King Emperor 51 TLR 10 (PC) ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Tex Chand v. Dile Ram AIR [2001] SC 905 ***(refd)***

For the appellants - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co
For the respondent - CV Prabhakaran (Rajiv Prabhakaran with him); M/s Praba & Assoc

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 96/96(S)-12-185-96]

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum JCA:

Introduction

On 16 August 2004 we allowed this appeal. We reversed the judgment of the Sessions Court which was upheld by the High Court on appeal. We came to the conclusion that the respondent was liable for the collision of the two motor cycles bearing registration numbers DP 3935 and PBH 2519 respectively on 25 December 1993 along Jalan Tanjung Bunga in front of Hotel Mount Pleasure, Penang. The issue of quantum was not before us and not an issue between the parties.

Since we reversed the concurrent decisions of the courts below, it would only be appropriate that we should give our reasons. In doing so we are well aware of the principle that generally a higher appellate court does not interfere with concurrent findings of fact by an intermediate appellate court and a trial court unless there is clear justification. (See: *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Others* [1998] 1 CLJ 793). Where the findings of fact depended upon inferences drawn from other facts an appellate court is more readily inclined to interfere with such findings and form its independent opinion as the court is in as good a position to review and evaluate the evidence of the case as the trial judge. (See: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 2 MLJ 517). We also bear in mind that it is the duty of an appellate tribunal to check by critical examination of the whole of the evidence a trial judge's conclusion as to the truthfulness of a particular witness. (See: *Abraham Ho Ah Loke v. William Manson-Hing* [1949] MLJ 37).

Background Facts

At about 2.30am on 25 December 1993 two motor cycles collided along Jalan Tanjung Bunga in front of Hotel Mount Pleasure, Penang. The rider of the motor cycle bearing registration number DP 3935 was the 1st appellant with the 2nd appellant as the pillion rider. They were coming from Bayan Baru and heading for Batu Ferringgi to meet up with some friends at Borsalino Disco.

As a result of the collision, both the appellants were injured requiring hospitalization.

There was no police report made soon after the collision. It was only made on 15 December 1994 by the 1st appellant disclosing, *inter alia*, PBH 2519 as the registration number of the other motor cycle involved. It was not denied that such motor cycle was registered under the name of the respondent.

It was the assertion of the appellants that the other motor cycle encroached into their rightful lane without any warning thereby causing the collision.

In response, the respondent denied being involved in any collision on that fateful morning. He asserted that he was at home sleeping. But having pleaded thus, the respondent went on to say that even if he was involved, the collision was due to the negligence of, or contributed by, the appellants.

In The Sessions Court

Having heard the evidence, the learned Sessions Court judge came to the conclusion that the appellants had failed to prove their case. Their accounts of the incident were found to be conflicting and thus not credible. The learned Sessions Court judge also disbelieved the prime witness of the appellants, namely, George Albert a/l Jacob (PW2), who testified that he witnessed the collision and did help the injured appellants. The learned Sessions Court judge went on to rule that it was for the appellants to establish their case on the balance of probabilities and not for the respondent to prove that he was not involved in the collision.

The respondent only gave evidence along the line of his main defence, namely, denial of involvement in any collision on or around the morning of 25 December 1993.

In The High Court

In dismissing the appeal, the learned High Court Judge concurred with the findings of the learned Sessions Court judge in particular on the credibility of the appellants and PW2. The findings of the Sessions Court were viewed as well-reasoned.

It was also the conclusion of the learned High Court Judge that the learned Sessions Court judge had considered the evidence adduced as a whole including a finding of fact that the respondent was sleeping in his house at the time of the alleged collision.

On the alternate plea of the respondent, the learned High Court Judge took the view that it was proper and in accordance with the accepted rules of pleadings.

The Appeal

(a) The Contentions

Before us, learned counsel for the appellants raised several grounds in seeking for the reversal of the decisions of the courts below.

And in his submissions, learned counsel highlighted the following points:

(a) the failure of the learned Sessions Court Judge to do a proper evaluation of the evidence adduced. Those favourable to the appellants and those adverse to the respondent were not considered or not sufficiently evaluated;

(b) the respondent only appeared before the Sessions Court at the defence stage, hence he could not be brought in earlier by the 1st appellant for the purpose of identification;

(c) the appellants paid full attention to the plate number of the other motor cycle while the respondent was fleeing from the scene of the collision;

(d) the main defence of the respondent was a complete denial and alibi. However, an alternative defence of negligence or contributory negligence was also pleaded. The Sessions Court did not consider the issue and should have put the respondent to election;

(e) there were inconsistencies in the evidence of the respondent but the Sessions Court failed to consider them;

(f) the respondent failed to call his landlord although he was given time to do so. The Sessions Court did not draw any adverse inference for such failure;

(g) the issue on how PW2 was located by the appellants was not raised by the respondent and yet the Sessions Court took upon itself to consider it and made conclusions thereto;

(h) the learned High Court Judge merely adopted and supported the findings of the Sessions Court without examining the bases of such findings; and

(i) the learned High Court Judge made erroneous inferences.

In response, learned counsel for the respondent submitted thus:

(a) that the Sessions Court did evaluate all the evidence adduced;

(b) PW2 was a member of the Auxiliary Police and yet he failed to lodge a police report on the incident;

(c) that a police report was only lodged two months after the incident and not at the earliest opportunity available;

(d) the Sessions Court accepted the alibi defence of the respondent;

(e) since no photograph was produced of the damaged motor cycle of the 1st appellant, his assertion of such collision should be viewed with suspicion;

(f) there was no corroborative evidence adduced;

(g) the landlord of the respondent could not be called as a witness due to time constraints; and

(h) the alternative plea was merely a general question in relation to the issue of damages.

(b) The Oral Judgment

In our short oral judgment, we said that there were unsatisfactory features in the judgment of the Sessions Court, in particular, on the evaluation and appreciation of the evidence adduced and the wrong inferences made thereto. We, therefore, found it necessary to interfere with the decisions of the courts below and thus allowed this appeal.

(c) The Law

There are a host of reported cases, both local and foreign, which expound the legal principle that an appellate court is generally inclined to interfere with a decision of a Sessions Court if it has been arrived at without any or insufficient judicial evaluation and appreciation of the evidence adduced. In *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 Gopal Sri Ram JCA succinctly stated the principle at p. 33:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
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> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on

> appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
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> ...
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> In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involves, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. There are several authorities that establish the principle.

(See also: *Lim Tai Ming & Sons Credit Sdn Bhd v. Lim Tuck Thien* [2001] 1 CLJ 316; *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung and Another Appeal* [1997] 3 CLJ 189; *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; *Putra v. Sivagnanam & Anor* [1959] 25 MLJ 259; *Benmax v. Austin Motor Co Ltd* [1955] AC 370; *Sheo Swarup & Others v. The King Emperor* 51 TLR 10 (PC).

(d) Reviewing The Grounds Of Judgment Of The Sessions Court

In the instant appeal, we note that in the grounds of judgment of the learned Sessions Court judge the inconsistencies in the testimonies of the appellants and that of PW2 were over-emphasized without considering their overall evidence as against the whole of the evidence adduced including that of the respondent.

It was not considered that there was hardly any challenge to the evidence of the appellants and that of PW2 on specific and relevant material facts to the claim, namely, that the collision did happen and that the appellants were injured. And in view of the defence adopted by the respondent during the trial, the only main issue left for determination was the identification of the other motor cycle involved in the collision. Such issue should have been resolved by simply identifying the relevant evidence adduced by the appellants and the respondent and then 'assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of' such evidence.

Unfortunately, the learned Sessions Court judge failed to do so. As indicated above only the inconsistencies in the testimonies of the appellants and that of PW2 were appraised and subsequently used as the basis to disbelieve them and thereafter concluding that no case had been proved by the appellants on the balance of probabilities. There was scarcely any evaluation of the evidence of the respondent. In other words there was nothing in the grounds of judgment to indicate that the learned Sessions Court judge actually believed the respondent and disbelieved the appellants and PW2.

Accordingly, interference by this court was warranted since there was 'non-consideration of material evidence and appreciation of evidence' and the approach to the evidence was 'not objective and one sided'. (See: *Tek Chand v. Dile Ram* AIR [2001] SC 905 cited in *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor (supra).*

In fact, the learned Sessions Court judge went by way of inference and deduction in disbelieving the evidence of the appellants and that of PW2. The discrepancies noted were:

(a) the inconsistent statements by the 1st appellant in describing his position just before the collision. Initially, he said that he saw two motor cycles coming in the opposite direction with the first machine entering his lane and colliding with his motor cycle. Subsequently, he said that because there was a sharp corner to negotiate, he first saw the other motor cycle when it collided with his motor cycle;

(b) the conflicting statements by the 1st appellant, the 2nd appellant and PW2 on the positions of the appellants while on the ground after the collision. The appellants said that they were facing Georgetown while PW2 said that he saw them lying down facing Batu Ferringhi. But in re-examination, PW2 qualified his earlier statement by saying that he did not know their positions before he came to their aid;

(c) the conflicting statements by the 1st appellant, the 2nd appellant and PW2 on where PW2 stopped his motor cycle before coming to assist the appellants. The 1st appellant said that PW2 stopped it near where he was lying down but the 2nd appellant stated that PW2 stopped his motor cycle on the road but not near them. PW2 said that he stopped his machine on the other side of the road before coming to help the appellants;

(d) the conflict in the statements by the 2nd appellants and the 1st appellant on what PW2 did after getting them onto a lorry to send them to the hospital. The 2nd appellant said that PW2 followed the lorry while the 1st appellant said that he did not know where PW2 went after halting the lorry. In his evidence, PW2 said that he went back after helping the appellants;

(e) the discrepancy about the visit of PW2 to the hospital to see the 1st appellant. The 1st appellant said that PW2 came to see him while PW2 denied this and said that he did not even know the location of the hospital; and

(f) the conflict between the statements of the 2nd appellant and that of PW2 regarding the giving of the registration number of the other motor cycle. The 2nd appellant claimed that he gave the number to PW2 but the latter never mentioned it in his statement.

It is obvious that the noted discrepancies do not relate directly to the identification of the other motor cycle involved in the collision. Yet they were used by the learned Sessions Court judge by way of inference and deduction to disbelieve the overall evidence of the appellants and that of PW2 while completely ignoring their other unchallenged but material evidence. In our view, the approach was flawed in law.

In her grounds of judgment the learned Sessions Court judge also expressed reservation on the ability of PW2 to recall the registration number of the other motor cycle involved in the collision just because he denied visiting the 1st appellant in the hospital. We think the doubt was unjustified since his denial was not proved to be false. Further, it was wrong and devoid of any cogent reason for the learned Sessions Court judge to discard entirely the evidence of PW2 solely on the basis that his evidence was in conflict with the evidence of the appellants on certain issues which were not directly related to his statement that he saw the registration number of the other motor cycle involved in the collision. The learned Sessions Court judge failed to consider the fact that PW2 was unknown to the appellants before the collision and that his evidence was not motivated by any reason. In other words, PW2 was an independent witness.

(e) Evidence Identifying The Other Motor Cycle Involved In The Collision

The evidence on the identification of the registration number of the other motor cycle involved in the collision may be rehearsed briefly. It was the evidence of both the appellants that after they fell down from their motor cycle due to the collision, they were facing in the direction of Georgetown. Hence they managed to see the registration number of the other motor cycle involved. But the 1st Appellant also said that he attempted to get up but failed. Nevertheless, he managed to see the registration number. As for the 2nd appellant, he stated that he managed to sit down and that was when he managed to look at the plate number of the other motor cycle.

In his evidence, PW2 initially said that when he came to help the appellants, both were lying down facing Batu Ferringhi. But in his re-examination, PW2 admitted not knowing the positions of the appellants before he came. It was on the basis of the evidence of PW2 that the learned Sessions Court judge made an inference, namely, that the appellants could not have seen the

registration number of the motor cycle since they must have been in lying down positions as found by PW2 who came to their aid soon after the collision.

We would say that the inference was too presumptuous. It also set too high a standard for the appellants to meet when there was no necessity to do so. For instance, while accepting that PW2 came so soon after the collision, the learned Sessions Court judge omitted to note the clarification by him in re-examination. In other words, the learned Sessions Court judge refused to believe the appellants' version even with the benefit of the clarification by PW2.

The learned Sessions Court judge should have taken into account that after the fall, it was the unchallenged evidence of both the appellants that they attempted to get up. As such, there must have been some movements made. It would therefore be erroneous to assume or infer that the appellants must have been motionless after the fall. There was no doubt that they were conscious even after the fall.

Now, even assuming that the evidence of the appellants on the registration number of the other motor cycle involved in the collision were suspect, there was still the evidence of PW2 which should have been critically considered by the learned Sessions Court judge.

According to PW2, while he was helping the appellants, the rider of the other motor cycle pushed up his machine and left the scene. But that did not prevent PW2 from having a look at the registration number and he was sure of it as the place was lighted. This part of his evidence was unshaken even while under cross-examination.

Unfortunately, the learned Sessions Court judge disbelieved him on the basis as discussed hereinabove. Critical factors such as the absence of motive on the part of PW2 in coming to the court to testify and that the appellants and PW2 were strangers before the collision were not taken into account before disbelieving PW2. There was, therefore, no proper appreciation of such evidence. If the learned Sessions Court judge had undertaken such exercise, a different conclusion would have been arrived at towards PW2.

We also note that on one hand the learned Sessions Court judge disbelieved PW2 while on the other his evidence was relied upon to disbelieve the appellants regarding their positions after the collision. It is settled law that once part of a witness's evidence is disbelieved the rest should be considered with caution. (See: *Khoon Chye Hin v. Public Prosecutor* [1961] 27 MLJ 105).

And if any part of it is relied upon, cogent reason for doing so should be given. (See: *Ee Choon Bok and Anor v. Public Prosecutor* [1951] 17 MLJ 183). In the instant case, the learned Sessions Court judge failed to adhere to such principles of law.

Other reasons advanced by the learned Sessions Court judge in disbelieving PW2 were:

(a) his failure to lodge a police report or to inform and assist the police in its investigation on the collision;

(b) his failure to write down the number on any piece of paper and to keep it in his possession;

(c) the lapse of four months after the collision when he was contacted by the 2nd appellant; and

(d) the absence of any explanation as to how he was traced and contacted by the 1st appellant.

The first three reasons are related to the recollections of PW2. Further, in respect of the first reason, it is a principle of law that a witness should not be disbelieved just because he did not on his own accord go to the police and make a statement. (See: *Shanmugam v. Public Prosecutor* [1963] 29 MLJ 125). As for the last reason, it is irrelevant. It was rightly left out by the respondent. Unfortunately, the learned Sessions Court judge deemed it necessary to consider.

Overall, therefore, there was no lawful and justifiable reason for disbelieving the testimony of PW2 particularly his assertion that he saw and could still remember the registration number of the other motor cycle involved in the collision. His evidence provided the nexus between the motor cycle of the respondent and the collision. Thus, if that course was taken by the learned Sessions Court judge, she would have found that on the balance of probabilities, at least a *prima facie* case had been established by the appellants at the close of their case. The respondent would then have to rebut it.

(f) The Evidence Of The Respondent

In his evidence, the respondent denied that he was involved in any collision on 24 December 1993 or 25 December 1993. He said that at about 2.30am on 25 December 1993, he was at home sleeping after watching television. He also denied lending his motor cycle to anyone during that time. And although he had two sets of keys for his motor cycle, the respondent said that he kept both sets in his room and no one could have taken any of them. He also denied that his motor cycle was damaged during that time.

During his examination in chief, the respondent gave his address at Block 2, Room 37A Off Riverside, Penang. He testified that he was renting a room there. But under cross-examination, he changed it to 25, Kampong Rawa located near Jalan Petani and not Tanjong Bunga or Mount Pleasure. The respondent said that he was renting a room from his landlord, Mr. Bala. The respondent also said that the house was fenced. He claimed to be the person who locked the gate of the house on the night of 24 December 1993.

Although there was an alternative plea that the collision was wholly, caused or contributed to by the negligence of the appellants, no evidence was led on this aspect of the defence. Hence, the allegation stood unsubstantiated.

In dealing with the evidence of the respondent, the learned Sessions Court judge noted the change in the address given by him in the course of his testimony but did not make an issue out of it. Instead, it was only highlighted that the respondent had maintained his stand that he was sleeping in his house at that time and that he did not lend his motor cycle to anyone. The two sets of keys were kept by him and the machine was parked within the compound of the house and the gate locked.

Having said the foregoing, nothing more was said by the learned Sessions Court judge on the testimony of the respondent. Judicial evaluation of the evidence of the respondent was obviously absent. In *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2 MLJ 165 the Privy Council opined that 'if a trial judge feels compelled to reach a conclusion partly favourable to one party and partly to another in a case in which it must at least be plain that one party or the other is not telling the truth, it behoves him to analyse the rival stories with care and to consider their respective probabilities and at least to give reasons for a conclusion …'. In the instant case, the learned Sessions Court judge failed to perform such mandatory judicial function.

While the learned Sessions Court judge faulted the appellants for not calling as a witness the Investigating officer of the case, Sgt. Adnan, and for failing to give any reason for such failure, no such fault was attributed to the respondent for not calling his landlord despite earlier indication to the Sessions Court that he would be called and time was given to do so.

No doubt the apparent one-sided approach by the learned Sessions Court judge might have been premised on the basis that the burden was on the appellants to prove their case. But surely in the instant case, at least an attempt to equalize the standard of appreciation of the evidence adduced by both sides should have been made. Otherwise, it would be equivalent to disbelieving the appellants and PW2 on the basis of the testimony of the respondent which

was not clearly considered and accepted. In our judgment, such approach runs foul of the requirement that 'a judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him'. (See: *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor (supra)*).

As regards the judgment of the learned High Court Judge, we would only say that it added nothing substantial but merely concurred with that of the learned Sessions Court judge. There is also one glaring contradictory conclusion in the judgment. In the early part of his judgment, the learned High Court Judge took it as a fact that the motor cycle bearing registration number PBH 2519 was involved in the collision. Subsequently, he stated that the learned Sessions Court judge accepted as a fact that the respondent was sleeping in his house at the time of the collision. No such finding of fact was made by the learned Sessions Court judge.

The learned High Court Judge also made inferences and assumptions which were not supported by the evidence adduced. For instance:

(a) he stated that the 2nd appellant could not have remembered the number of the other motor cycle involved in the collision since he did not write it down and there was already a lapse of two months before the police report was made. In our view, it is too presumptuous to say that within two months PW4 must have forgotten the number;

(b) he highlighted the failure of the appellants to call any independent witness such as the Investigating officer of Traffic cases. This view appears to indicate that PW2 was in collaboration with the appellants to blame the respondent for the collision when there was no such assertion and no evidence to that effect; and

(c) he concluded that the learned Sessions Court judge could not accept the evidence of PW2 due to the material discrepancies between the evidence of PW1, PW2 and PW4. In fact such reason did not come from the learned Sessions Court judge. The term used was 'inconsistencies' and there was no qualification made whether such inconsistencies were major or minor. In law, the two categories have different connotations. Anyway, even 'where there are material inconsistencies in the evidence of a witness he can be believed if he is supported by other satisfactory evidence'. (See: *Public Prosecutor v. Ramli bin Shafie* [2002] 6 MLJ 153 citing *Kalachand Sircar v. Queen-Empress* ILR 13 Cal 53).

Conclusion

If there had been a proper appreciation and evaluation of the evidence and materials, including the evidence of the respondent, placed before the learned Sessions Court judge, a finding of liability premised on the balance of probabilities would have been made against the respondent.

Thus, for the reasons stated hereinabove we allowed this appeal, reversed the decisions of the courts below on liability and entered judgment in favour of the appellants as per the quantum decided by the Sessions Court and affirmed by the High Court.

We did also consider the other issues submitted in the course of the respective submissions by learned counsel for the parties. However we are inclined not to dwell on any of them. Our views on them would have no effect on our final determination of this appeal.

Lastly, we ordered costs of this appeal to be taxed and paid to the appellants. The deposit paid is to be refunded to the appellants.